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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 134

JOHN THOMAS CARTER and EUGENE PEARSON MACEMORE
APPELLANTS

vs.

THE COMMONWEALTH OF VIRGINIA
APPELLEE

BRIEF OF COMMONWEALTH OF VIRGINIA, APPELLEE

OPINION BELOW

The opinion of the Supreme Court of Appeals of Virginia, pursuant to which the judgment appealed from was entered, is reported in 181 Va. 306, and in 24 S. E. (2d) 569. See also the opinion in the companion case of *Dickerson* v. *Commonwealth*, 181 Va. 313, 24 S. E. (2d) 550.

GROUNDS FOR JURISDICTION

The appellants challenge the validity of section 49-a of the Virginia Alcoholic Beverage Control Act in so far as it is construed by the court below to authorize the Virginia Alcoholic Beverage Control Board to promulgate certain regulations relating to the transportation by motor vehicle in, into, and through Virginia of alcoholic beverages in quantities in excess of one gallon, and also challenge the validity of said regulations as constituting an undue burden on interstate commerce in violation of the Commerce Clause of the Constitution of the United States.

STATEMENT OF THE CASE

The statute and regulations complained of are set out in the appendix, being section 49-a of the Alcoholic Beverage Control Act and sections 42 and 44 of the regulations of said Board. The provisions of the regulations here complained of are that transportation by motor vehicle carriers through the State of alcoholic beverages in quantities in excess of one gallon is not permitted unless the following requirements are met: (1) The transportation must be accompanied by a bill of lading or other memorandum of shipment showing, (a) the route to be traveled by the vehicle in Virginia, which must be the most direct route from the point of origin to the destination; (b) the name of the consignee, who must be a person who has a legal right to receive delivery of same at point of

destination (Regulation 44); (2) The person transporting the beverages must post a bond in the penalty of one thousand dollars subject to cancellation by the Board, conditioned that he will not unlawfully transport or deliver alcoholic beverages in Virginia (Regulation 42).

The appellants, motor vehicle carriers for hire, were convicted of transporting over the highways of Virginia, in a Ford truck, one hundred and sixty-eight gallons of assorted whiskies, pursuant to an agreed statement of facts showing violation of all of the above requirements of the Board's regulations. The bill of lading did not show the highway route to be traveled in Virginia. It disclosed a consignee in North Carolina, who could not legally receive delivery of the shipment at the place of destination designated. The appellants had not posted with the Board the bond required to permit them to transport the whiskey. These facts are undisputed. (Stipulation of Facts, R. p. 33). The whiskey was acquired in Maryland and was accompanied by a bill of lading showing it was to be delivered to R. M. Willard, trading as Eagle Distilling Company, at Thomasville, North Carolina.

The truck in which the whiskey was being transported was registered in the name of Healton Miller, of Winston-Salem, North Carolina, who pursuant to said section 42 of the regulations of said Board had posted the bond thereby required (R. pp. 34-35). This bond and said sections 42 and 44 of the regulations, the court below held, constituted a permit authorizing said Miller to transport whiskey *within, into,* and *though* the State of Virginia in conformity with said regula-

tions. This permit had been cancelled by said Board, however, about three weeks prior to the date of the transportation here involved, upon information that said Miller had the reputation of being a bootlegger in North Carolina (R. p. 34). Appellants do not contend that Miller's permit would have conferred on them the authority to engage in such transportation, even if it had not been cancelled. The permit was a personal one and was restricted to a particular vehicle. Appellants do not claim even to have been acting as agents for Miller in transporting the whiskey, or that Miller's permit authorized him to employ or utilize them as agents for that purpose. Miller himself made no objection to the cancellation of his permit; in fact, he did not even appear in the case. Appellants do object to the power of the Board to cancel the permit for cause.

QUESTIONS PRESENTED

The following questions are raised by the assignments of error:

A. Are the foregoing requirements with respect to the bill of lading, the bond, and the legal right of the consignee to receive delivery, which are imposed by the regulations governing the transportation of alcoholic beverages within, into, and through Virginia, over its highways, a proper exercise of the police power of the State?

B. Do the appellants, admittedly engaged in transporting whiskey unlawfully and in violation of the

Constitution (Twenty-first Amendment), have any standing in Court to challenge a State regulation pertaining to such unlawful act?

In the discussion of these questions the appellee will endeavor to maintain the following propositions:

SUMMARY OF ARGUMENT

I. The Virginia system of liquor control requires, for the protection of State revenues and the public welfare, that unlawful traffic in alcoholic beverages be suppressed.

II. In the absence of the exercise by Congress of its power to regulate the transportation by motor vehicle of Alcoholic beverages in interstate commerce over the highways of the States, a State may regulate such transportation, and may adopt appropriate measures to prevent the unlawful diversion, delivery, or use of such beverages within its borders.

III. The Court will not strike down nondiscriminatory State regulations intended to confine the interstate movement of alcoholic beverages within legitimate channels unless the Court can say that the regulations are not supported by any reasonable or rational basis.

IV. The requirement of regulation No. 42 with respect to the posting of a bond having the effect of a permit to transport beverages within, into, and through the State is a reasonable and

appropriate measure to prevent unlawful diversion, delivery or use within the State. That the permit shall be revocable for good cause is not an unreasonable condition.

V. The requirement of Regulation No. 44 that a bill of lading or memorandum of shipment shall accompany the transportation, showing the highway route to be traveled, and that said route be the most direct to the point of destination, is a reasonable and appropriate measure to prevent the unlawful diversion, delivery or use of such beverages within the State.

VI. The requirement that the consignee, named in the bill of lading, be a person who has a legal right to receive delivery of the alcoholic beverages in the State of destination is a reasonable and appropriate measure to prevent their unlawful diversion, delivery, or use within the State of Virginia.

VII. Should the Court be of opinion that the challenged regulatory provisions are not within the State's retained power to regulate the transportation of intoxicating liquors in interstate commerce, such regulations are a valid exercise of the power of the State derived from the Twenty-first Amendment.

VIII. The appellants, having admitted as a fact that they were, at the time they were apprehended, engaged in transporting alcoholic beverages into North Carolina, in violation of the laws

of that State and of the Constitution of the United States, are without standing in Court to challenge Virginia's regulation of their actions.

The foregoing propositions will be discussed in the order above set out.

I.

The Virginia System of Liquor Control Requires, for the Protection of State Revenues and the Public Welfare, That Unlawful Traffic in Alcoholic Beverages be Suppressed.

Liquor control has for many years been an acute problem in Virginia. Before the adoption of the Eighteenth Amendment, pursuant to a popular referendum, strict prohibition laws had been enacted by its Legislature. In a similar referendum about seventeen years later a substantial majority voted for repeal of the Eighteenth Amendment, and of the State prohibition laws. Following such repeal, a commission was appointed to recommend to the Legislature a system of liquor control. This commission recommended, in substance, the plan enacted into law by the Virginia Alcoholic Beverage Control Act (Acts 1934, pp. 100-136). (See Michie's 1942 Virginia Code, Sections 4675(1)—4675(69a), inclusive, which includes all amendments of the Act to date). Under this statute the pre-prohibition system of sales of distilled spirits and fortified wines by private licensees was discarded and such sales are permitted only in bottles in stores operated by the Alcoholic Beverage Control Board. The sale of whiskey or other distilled spirits or fortified

wines, by the drink is forbidden. Light wines and beer may be sold either by the drink or in bottles by suitable persons licensed by the Board. Revenue derived from the operation of the State stores takes the place of taxes on wine and distilled spirits. A State tax is imposed on beer, and license taxes on beer and wine licensees.

The statute vests in the Board broad discretionary powers with respect to granting, suspending, and revoking beer and wine licenses, and regulating the licensees' conduct of their businesses.

Section 5(a) of the Act, empowering the Board to make regulations, is as follows:

> "The Board may from time to time make such reasonable regulations, not inconsistent with this act, nor the general laws of the State, as the Board shall deem necessary to carry out the purposes and provisions of this act, and to prevent the illegal manufacture, bottling, sale, distribution and transportation of alcoholic beverages, or any one or more of such illegal acts, and from time to time alter, repeal, or amend such regulations or any of them. Such regulations shall be published at least once in some newspaper published in the city of Richmond and in any other manner which the Board may deem advisable, and upon being so published shall have the force and effect of law. The Board shall certify to the clerks of all circuit courts and city courts of record having criminal jurisdiction copies of all regulations adopted by

the Board; such clerks shall keep on file for public inspection all such regulations certified to them by the Board."

Section 49-a of said Act (Appendix, p. 33) prohibits the transportation of alcoholic beverages within, into, or through the State in quantities in excess of one gallon "except in accordance with regulations" of the Board, and the Board is empowered to adopt such regulations as it may deem necessary "to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations".

In order that the system thus established may be successfully operated, it is essential that substantially all fortified wines and distilled spirits consumed in the State be purchased from State stores. This is necessary to provide proper public revenue, as well as to prevent the well-known evils incident to bootlegging. For these reasons the statute and regulations are designed to restrict the movement of such beverages within legitimate channels. The power of the State to so confine such movements through the State will next be considered.

II.

In the Absence of the Exercise by Congress of its Power to Regulate the Transportation by Motor Vehicle of Alcoholic Beverages in Interstate Commerce over the Highways of the States, a State May Regulate Such Transportation, and May Adopt Appropriate Measures to Prevent the Unlawful Diversion, Delivery, or Use of Such Beverages within its Borders.

Liquor being transported through Virginia in violation of the regulations of the Board is contraband and subject to immediate seizure under the Virginia statute. *Dickerson* v. *Commonwealth,* 181 Va. 313, 327; 24 S. E. (2d) 550, 557. The appellants contend that their conviction of the offense of transporting such contraband is in violation of the Commerce Clause of the Constitution.

The question of the power of the States to regulate matters of local concern, although such regulation affects interstate commerce, or to regulate such commerce itself, in the absence of Federal regulation, has recently been given such exhaustive consideration by this Court in the four cases cited below that it is not believed any good purpose will be served by a review of any prior decisions save those which have a direct relation to the particular facts of this case or the principles applicable thereto. The following are the cases referred to:

California v. *Thompson,* 313 U. S. 109;
Duckworth v. *Arkansas,* 314 U. S. 390;
South Carolina State Highway Department v. *Barnwell,* 303 U. S. 177;
Ziffrin v. *Reeves,* 308 U. S. 132.

These cases, and the many others therein cited, clearly sustain the State's authority to regulate local matters involved in such commerce. The power need not result from an express grant of authority by Congress, such as the Wilson Act or the Webb-Kenyon Act. On the contrary, these decisions clearly establish the principle that the States retained such regulatory power under the Constitution, and that they may continue to exercise it *unless and until such exercise is restricted by an Act of Congress.* These cases hold that such exercise of the power is not in violation of the Commerce Clause, even though the regulation interferes to some extent with interstate commerce. Obviously there are many local matters which must be so regulated since they are of a type not susceptible of uniform nationwide regulation. Because of difference in local conditions, they can be dealt with effectively only by the local authorities who are in close touch with, and familiar with, the problems involved.

These decisions make it clear, however, that a State regulation of or affecting interstate commerce *must not discriminate* against that commerce or interfere with same beyond what is reasonably necessary to accomplish the permitted end.

III.

The Court Will not Strike Down Nondiscriminatory State Regulations Intended to Confine the Interstate Movement of Alcoholic Beverages within Legitimate Channels unless the Court Can Say That the Regulations Are not Supported by Any Reasonable or Rational Basis.

In *South Carolina Highway Department* v. *Barnwell, supra,* Mr. Chief Justice Stone discussess at length the extent to which the judicial function will be exercised in determining the validity of a State regulation involving a burden on interstate commerce. "So long as the State action does not discriminate, the burden is one which the Constitution permits because it is an inseparable incident of the exercise of a legislative authority, which, under the Constitution, has been left to the States." (303 U. S. 189.) If the burden is too great, it is the function of Congress to so determine and correct it by appropriate regulation. "But that is a legislative, not a judicial function, to be performed in the light of the Congressional judgment of what is appropriate regulation of interstate commerce" (303 U. S. 190). And in determining the question whether South Carolina's regulation of the weight and width of trucks allowed to travel over its highways constituted an unlawful burden on interstate commerce, the opinion states that the regulation's "constitutionality is not to be determined by weighing in the judicial scales the merits of the legislative choice and rejecting it if the weight of evidence presented in court appears to favor a different standard. Cf. *Worcester County Trust Co.* v. *Riley*, 302 U. S. 292. Being a legislative judgment

it is presumed to be supported by facts known to the legislature unless facts judicially known or proved preclude that possibility. Hence, in reviewing the present determination we examine the record, not to see whether the findings of the court below are supported by evidence, but to ascertain upon the whole record whether it is possible to say that the legislative choice is without rational basis." (303 U. S. 191.)

In *Duckworth* v. *Arkansas*, 314 U. S. 390, this Court evidently gave further consideration to the question whether the judicial power should be more freely exercised to forbid State regulatory legislation of or affecting interstate commerce. While the question is not discussed in the Court's opinion, in his concurring opinion Mr. Justice Jackson seems to express the view that the courts should assume the responsibility of determining the wisdom of such State legislation.

To do so, however, would inject a high degree of uncertainty into nearly all State regulatory legislation, because the field within which Congress exercises the commerce power has been so greatly extended in recent years. Federal regulation of labor relations, and of wages and hours of employment, is now being exercised in nearly all substantial industries and occupations, and in a great many which are of little importance. In agriculture the power of Federal regulation is exercised in the most minute transactions, including the use by a farmer of a small part of his wheat crop wholly for consumption on the farm. *Wickard* v. *Filburn*, 317 U. S. 111, 87 L. Ed. 57 (adv. op.) The foregoing are but illustrative of the broad scope which Federal regu-

lation of local affairs has assumed. It embraces not only matters which in themselves constitute interstate commerce, but has been extended over all transactions "affecting" interstate commerce. It is immaterial, therefore, in determining State or Federal jurisdiction or power to regulate, whether the subject of regulation be termed an "intrastate transaction affecting interstate commerce" or "a transaction in interstate commerce." The Federal power may be exercised alike in either case. Since the sum total of these two types of transactions cover substantially the entire field of business and professional activities, nearly every State regulatory measure "affects interstate commerce", whether Congress has actually entered the field or not. It is obvious, therefore, that to increase the measure and degree of judicial control and supervision over all State regulations *affecting* commerce would result in opening the flood gates of litigation. No regulation could be too local in character to escape challenge in the Courts as an unconstitutional interference with and burden upon commerce. If chaos is to be avoided the problem of division of State and Federal regulatory activities must be left largely to their respective legislative bodies. The Federal Government cannot regulate everything, neither can the States. Experience alone can develop from time to time, through a process of evolution, the respective fields in which each can function to the best advantage.

The *Duckworth case* just referred to sustains the power of the States to regulate the transportation of intoxicating liquor through their borders, and to adopt

effective measures to afford local protection from the attendant dangers to the communities through which it passes. A State regulation requiring a permit to transport liquor through the State was held to be a proper one. Mr. Chief Justice Stone, in his opinion in that case, pointed out that State and National efforts to regulate intoxicating liquors "have not left us unaware of the peculiar difficulties of controlling it or of its tendency to get out of legal bounds", and that the extent of the State's broad power to regulate transportation of intoxicating liquors in commerce is not necessarily a criterion of authority "to regulate other articles of commerce less susceptible to uses injurious to the communities through which they pass".

The appellee will now discuss the application of these established tests and principles to the regulatory provisions here challenged.

IV.

The Requirement of Regulation No. 42 With Respect to the Posting of a Bond Having the Effect of a Permit to Transport Alcoholic Beverages Through the State is a Reasonable and Appropriate Measure to Prevent Unlawful Diversion, Delivery or Use Within the State. That the Permit shall be Revocable for Good Cause Is not an Unreasonable Condition.

The regulation requires a person desiring to engage in the business of transporting alcoholic beverages to post with the Alcoholic Beverage Control Board a bond in the penalty of one thousand dollars. The condition of the bond is that such person will not unlawfully

transport or deliver such beverages in Virginia. The regulation also requires that evidence of the posting of the bond shall accompany the transportation at all times. This evidence, the Court below held, "constituted a permit—a permit to lawfully transport." The regulation applies alike, and without discrimination, to both interstate and local shipments.

Appellants do not challenge the validity of the requirement that the bond be posted by the carrier. Their objection is to the power of the Board to revoke the resulting permit to transport alcoholic beverages into, within, and through the State.

The question whether the power of the Board to revoke the permit violates the Commerce Clause is not properly before the Court on this appeal. It was sought to be injected into the case because the truck in which appellants were transporting the whiskey was registered in North Carolina in the name of one Miller, who had sometime before posted the required bond and been given by the Board evidence thereof in the form of a certificate as follows: "This is to certify That Healton Miller of Winston-Salem, North Carolina, has filed with this Board, bond as required under the regulations governing the transportation of alcoholic beverages *within, into* or *through* the State of Virginia in quantities in excess of one (1) gallon". (Italics supplied.) In the "Evidence of Bond" or certificate Miller is designated as Carrier No. 324, and the vehicle's motor number in which he was permitted to transport such beverages was endorsed on said certificate. (R. pp. 35-36.) There is no evidence that the

vehicle in which appellees were transporting was the one referred to in the certificate. The certificate or permit was cancelled by the Board upon information that Miller was a bootlegger. Concerning this question the Court below said:

> "Miller, the only person who had the right to challenge the cancellation of his bond, is not a party to this proceeding. There is no evidence that he protested the action of the Board. It does not appear from the record what connection he had with the transportation of the whiskey, nor whether Carter and Macemore were his agents. We are not told whether the latter were using the truck with or without Miller's knowledge, or what action, if any, he may have taken to protect his property rights in the truck.
>
> "The bond is conditioned that the carrier will not engage in the unlawful transportation of alcoholic spirits within, into or through the State of Virginia. Evidence of its posting with the Board constituted a permit—a permit to lawfully transport. Cancelled or uncancelled, it gives no one a permit for unlawful transportation.
>
> "Whether or not the appellants might have given an acceptable bond for interstate transportation through Virginia is not an issue here. If such a bond had been given, it would have permitted lawful transportation, but it would have afforded no defense to an unlawful carriage.
>
> "The requirement for the posting of a bond is a regulation of a police nature. The Board having the authority to require the bond, under the police powers conferred upon it by the A.

B. C. Act, had the right to cancel it with or without notice under the same power if, in the exercise of a reasonable discretion, it was satisfied that it was being used or about to be used against the public safety and welfare.

"It is not to be presumed that the authority of the Board will be arbitrarily used; but in the event that it is abused, a person feeling himself aggrieved may seek judicial relief in the courts." (R. pp. 41-42.)

Thus, the Court having held that appellants were without standing to challenge the authority of the Board to cancel the bond or permit, what the Court said with respect to such authority was a mere dictum. But even if this were not the case, the interpretation of the statute by the Court was obviously correct. Miller's permit authorized him to transport such beverages not only *through* but also *into* and *within* the State. The dictum of the Court below obviously did not express any view as to the authority to revoke a permit restricted to transportation *through* the State or the effect of the *Commerce Clause* with respect to such authority. Neither the regulation nor the statute contains any provision providing for the revocation of any permits.

But even if the court had construed the statute as authorizing the Board to revoke a permit to transport only through the State, it is submitted such interpretation would not have violated the Commerce Clause. As said by the court below, "The bond required under section 42 of the regulations is for the purpose of insuring the fitness and integrity of the carrier of the liquor.

It is evidence of his responsibility and a guaranty of lawful transportation. It confines the transportation to a channel deemed trustworthy". (R. p. 41.)

The permit is a liberal one in its nature. It is not restricted to a designated trip on a particular day but authorizes the carrier to engage generally in the business of transporting beverages, (a) between points within the State, (b) from a point without the State to a point within, and also (c) through the State. Certainly a person engaged in the unlawful business of bootlegging liquors cannot demand or expect the granting of or continuation of a permit for any one of these types of transportation. Such a person may be expected to sell his wares in Virginia as well as elsewhere, if the opportunity offers. The permit would provide him with an effective cloak to conceal such unlawful enterprise within the State. The permittee, even though allowed to transport *through the State only*, might actually intend to deliver the beverages to some bootlegger in Virginia not legally entitled to receive delivery. In order to conceal his actual intention, the bill of lading would designate a consignee in another State as a protection in case his shipment should be apprehended. If he names a lawful consignee who had no agreement to receive the shipment, he would run the risk of exposure. He might, therefore, consign the shipment to a partner in the enterprise residing in another State not entitled to receive delivery there. Obviously the character and responsibility of a person permitted to transport intoxicating liquors in motor vehicles over the highways of the State is a most im-

portant consideration, whether the destination of the shipment purports to be within or outside the State. This was recognized by this Court in the case of *Ziffrin* v. *Reeves, supra,* which involved the validity of a Kentucky statute restricting the transportation of distilled spirits to common carriers. A contract carrier was refused a license to transport such beverages from a Kentucky distillery to consignees in Chicago, and challenged the statute as violating the commerce, due process and equal protection clauses of the Constitution. In sustaining the right of the State to confine such *interstate* transportation of distilled spirits to common carriers, this Court said that "A licensed Common Carrier is under stricter control than an ordinary contract carrier and may be entrusted with privileges forbidden to the latter. Here the law creates no discrimination against interstate commerce. It is subjected to the same regulations as those applicable to intrastate commerce."

The *Ziffrin case* holds that the State may lawfully prohibit a contract carrier from transporting within its borders alcoholic beverages moving in interstate commerce with a destination beyond the State, even though the consignee there may lawfully receive the same. If the State can absolutely prohibit such transportation by a carrier for hire or contract carrier, it certainly may revoke a permit so to transport in case the permittee is found to be a person of unsuitable character, such as one engaged in the unlawful business of bootlegging. As said in the *Ziffrin case,* "the greater power includes the less".

Appellants seek to distinguish the *Ziffrin case* be-

cause the shipments involved originated in Kentucky, though destined for points outside the State. But the shipment was an interstate one and the principle involved is the same. Kentucky was endeavoring to prevent unlawful diversions of the liquor within the State, and that is exactly what Virginia is trying to do. In the *Duckworth case, supra,* this protective power of the State was held to extend also to transportation of such beverages *through* the State.

In *California* v. *Thompson,* 313 U. S. 109, this Court sustained the State's power to require a nondiscriminatory license of a transportation agent engaged in selling or negotiating transportation over the public highways of the State, to restrict such licenses to persons possessing the requisite fitness therefor, and to require a bond conditioned upon the faithful performance of the contracts they negotiate. The fact that the transportation negotiated was interstate was held not to affect the statute's validity, since Congress has not undertaken to regulate such transactions.

Obviously it is of greater importance to the welfare of the people of a State that a person permitted to engage in the business of a carrier of intoxicating liquors over the State's highways possess the requisite fitness therefor, than that only a fit person be licensed to negotiate motor vehicle transportation.

Appellants argue that the Board may be arbitrary in its actions with respect to revoking permits, and contend that no recourse to the courts is provided in such cases. But the court below, in the portion of its opinion above quoted, held that "a person feeling

himself aggrieved may seek judicial relief". Appellants argue that because the Board's action is a discretionary one and mandamus will not lie, therefore no remedy exists. The obvious answer is that a court of equity will enjoin the further withholding of the permit by the Board if it has been revoked without just cause.

In conclusion on this point, should the Court consider the question properly before it, it is submitted that a State may properly revoke a permit given a carrier for hire to transport liquor over its highways and through the State if such permittee is found to be a person unfit and unsuitable to be entrusted with that privilege, and that the exercise of such power is not an unreasonable obstruction of interstate commerce.

V.

The Requirement of Regulation No. 44 That a Bill of Lading or Memorandum of Shipment Shall Accompany the Transportation, Showing the Highway Route to be Traveled, and That Said Route Be the Most Direct to the Point of Destination, Is a Reasonable and Appropriate Measure to Prevent the Unlawful Diversion, Delivery or Use of Such Beverages within the State.

Appellants do not question the propriety of requiring the bill of lading accompanying the shipment to designate the highway route in the State over which the alcoholic beverages are to be transported. But they challenge the reasonableness of the requirement that such designated route be the "most direct route from the consignor's place of business to the place of business

of the consignee", and that the carrier shall not depart from said route.

Appellants argue, first, that the carrier might be inconvenienced in having to consult the road maps to ascertain the proper route. But a legitimate carrier would do this regardless of the regulation, for reasons of economy. It is to his own interest to travel over the most direct route through the State. It is fanciful to suggest that a person engaged in the general business of a carrier for hire through Virginia would not inform himself on this subject.

The obvious purpose of the requirement is to prevent a carrier, so far as possible, from delivering contraband whiskey in Virginia under pretense, if apprehended, of being engaged in through transportation, or in transportation from one point in the State to another in the State. If he is found transporting same over a highway which is not the most direct, established one for the pretended journey, the chances are the shipment is not a *bona fide* one, that he really intends to deliver it to someone other than the named consignee. Of course, if every carrier was absolutely dependable and law abiding, there would be no necessity for any regulations. Unfortunately, it is a matter of common knowledge that this is not true. The lucrative profit incident to the illicit traffic in liquor has resulted in the creation of nationwide organizations engaged in pursuit of such unlawful gains. If the permittee, on one pretense or another, were allowed to ramble over the State at will under the protection of an unrestricted permit, there would be no effective regulation at all. It would be

necessary to catch him in the act of making an unlawful delivery a most difficult thing to do, before he could be apprehended or punished. He might be found transporting at a point in Virginia a hundred or more miles from his proper route, in the course of making an unlawful delivery, and yet such a permit would shield him from arrest.

Appellants' third argument is that the carrier for hire might desire to transport other articles than liquor to a point in another section of the State and adherence to the direct route would entail an unnecessary burden and expense. But it would be very easy for a permittee desiring to make an unlawful delivery of liquor at a point off the direct route to arrange a consignment of articles other than liquor to the person to whom it was really intended to deliver the liquor. This would furnish a legally justifiable reason for his presence at the place of intended unlawful delivery.

In this connection, attention is again called to the holding of this Court in the *Ziffrin* case that the State is not compelled to permit the transportation in interstate commerce of alcoholic beverages by contract carriers. The demands for such transportation through the State are adequately met by the facilities of common carriers. If the carrier for hire finds that he cannot profitably engage in that business in conformity with the State's regulations, he may leave that to the common carriers. It is a matter of common knowledge that nearly all such legitimate transportation, as a matter of fact, is conducted by the railroads and railway express companies. Even if Virginia should not permit con-

tract carriers and carriers for hire to engage in such transportation no real obstruction to the movement of alcoholic beverages in interstate commerce would result therefrom.

VI.

The Requirement That the Consignee, Named in the Bill of Lading, Be a Person Who Has a Legal Right to Receive Delivery of the Alcoholic Beverages in the State of Destination Is a Reasonable and Appropriate Measure to Prevent Their Unlawful Diversion, Delivery or Use within the State of Virginia.

The purpose of the above requirement is to prevent for hire or contract carriers, who are liquor law violators, from transporting alcoholic beverages over the highways of the State. Carriers haul in large quantities and it is essential, in order to guard against unlawful deliveries in Virginia, that every reasonable precaution be taken to assure that persons permitted to engage in the business of transporting liquor over such highways are reliable and trustworthy. The requirement that the consignee be legally entitled to receive delivery of the beverages applies alike to intrastate as well as interstate shipments and does not discriminate against interstate commerce. A carrier who will transport into North Carolina and make delivery in that State in violation of its laws will not hesitate to make unlawful deliveries in Virginia if it is to his advantage to do so. The bill of lading showing an unlawful consignee in another State may well be a device to cover up and conceal the carrier's actual intention to

sell or deliver the liquor in Virginia. If such a consignment should be held to have the legal effect of protecting him from arrest and conviction for unlawful transportation, it would be necessary to catch him in the act of such selling or delivering in order to punish him for violation of the statute.

A State regulation of a local matter affecting interstate commerce which is designed to confine to persons of good character and responsibility those engaging in activities fraught with dangers to the welfare of the people of the State is a proper and reasonable exercise of the police power. *California* v. *Thompson, supra.* Since the State may forbid any transportation at all within its borders of alcoholic beverages in interstate commerce by contract carriers (*Ziffrin* v. *Reeves, supra*), it must necessarily follow that it may forbid carriers of this type from engaging in transportation which itself is an essential part of an unlawful enterprise.

Appellants argue that the requirement is obstructive of interstate commerce because the carrier might be misled as to the right of the consignee to receive delivery in the other State. The same argument would be equally applicable to an unlawful consignee in Virginia. If ignorance or pretense of ignorance of the law could be availed of during transportation, it would be equally a defense at the time of or after delivery. The regulation is designed to insure a responsible permittee; one who will inform himself that what he is doing is not a crime. The illicit liquor traffic reached huge proportions during prohibition. It is perhaps the most difficult problem to control involved in govern-

ment. Fanciful or imaginary obstructions to commerce should not be permitted to further increase the burden of controlling it. The proper interstate movement of alcoholic beverages is in no degree dependent upon contract or for hire carriers. In fact this seems to be a very unsatisfactory method of transporting such a troublesome article as intoxicating liquor. If a bill of lading indicating that such a shipment is intended to be delivered to an unlawful consignee in another State should be held to have the legal effect of a permit to transport it through Virginia, the State would be helpless to exercise any effective control over unlawful deliveries within its borders.

VII.

Should the Court Be of Opinion that the Challenged Regulatory Provisions Are not within the State's Retained Power to Regulate the Transportation of Intoxicating Liquors in Interstate Commerce, Such Regulations are a Valid Exercise of the Power of the State Derived from the Twenty-first Amendment.

The Twenty-first Amendment provides that the transportation or importation into a State "for delivery or use therein of intoxicating liquors in violation of the laws thereof, is hereby prohibited."

In *Duckworth* v. *Arkansas, supra*, this Court affirmed a conviction of violating a State statutory regulation requiring a permit to transport distilled spirits through that State. The liquor was admittedly being transported with the intention of taking it into Mississippi for sale there in violation of its laws. However, the

Court considered it unnecessary to determine the effect of this intended violation of the Twenty-first Amendment. The validity of the permit regulation was sustained as being a proper exercise of the police power of the State over local matters involved in interstate commerce.

Appellants seek to escape the decision in the *Duckworth case* because the requirements imposed on the permittee by the Virginia regulations were not attached to the permit provided for by the Arkansas statute. These requirements hereinbefore discussed, are the posting of a bond, having the effect of a permit; and that a bill of lading accompany the shipment showing the highway routes to be travelled in Virginia, which must be the most direct route suitable for the journey, and showing also the name of a consignee legally entitled to receive the shipment at the place of destination.

Virginia does not contend that the State possesses the power to prohibit shipments through its borders of intoxicating liquors in legitimate interstate commerce. The Twenty-first Amendment does, however, recognize the supremacy of all laws of the State reasonably designed to prevent the delivery or use therein of intoxicating liquors in violation of its statutes. And as before pointed out, that is exactly what these regulations are intended to accomplish. The mere assertion or representation by a transporter of such liquors that he intends to or will continue the transportaation through the State is not necessarily true. He may actually deliver the liquors in Virginia. If the State laws are to be made effective it is necessary to employ

adequate measure to insure, as far as practicable, that the shipment is, in fact, a through one and that there will be no delivery of the liquor within the State in violation of its laws. Since it would be an undue burden to undertake to convoy such shipments, the regulations are designed to restrict the for hire and contract carriers engaged in such transportation, to responsible persons of good character upon whom reliance can be placed that they will not violate the State laws. The carrier is not required to notify the Board in advance when he will transport a shipment of liquor, so that no surveillance is possible unless the enforcement officers receive such information from other sources. As a further safeguard such carriers are not allowed to roam at will over the State. They are required to travel over the most direct established route.

As the appellee has herein before endeavored to show in discussing these several requirements of the regulations, they are reasonable and necessary to prevent the delivery or use of motor vehicle shipments of liquor in violation of the laws of the State and of the Twenty-first Amendment.

VIII.

The Appellants, Having Admitted as a Fact That They Were, At the Time They Were Apprehended, Engaged in Transporting Alcoholic Beverages into North Carolina, in Violation of the Laws of That State and of the Constitution of the United States, Are Without Standing in Court to Challenge Virginia's Regulation of Their Actions.

The appellants assert the right to challenge the Virginia regulations relating to the transportation of alcoholic beverages by motor vehicle carriers, although they say they were engaged in transporting such beverages from Maryland through Virginia for the purpose of importing it into and delivering it in North Carolina in violation of the laws of that State. Such intended importation and delivery likewise constitute a violation of the Twenty-first Amendment. As pointed out by Mr. Justice Jackson in a concurring opinion in the *Duckworth case, supra*, they invoke the protection of the Commerce Clause to enable them to violate the Twenty-first Amendment. The question whether the Commerce Clause affords such protection is of vital importance in the efforts of the States to control the illicit traffic in intoxicating liquors. If it does, then a person is entitled to demand a permit to use the highways of one State in order to violate the laws of another, or else carry on the transportation without a permit. While it is true that in this case the violation of the North Carolina law and the amendment were not actually consummated, the transportation through Virginia was an essential part of the enterprise. It is significant that three cases have been appealed to

this Court in the last three years in which the transporters admitted they intended to make deliveries in another State which are prohibited by said amendment. They seem most eager for an adjudication of this question. A decision by this Court that the Commerce Clause protects such transportation through States other than that in which it is claimed the delivery is to be made would obviously facilitate the illegal traffic and greatly reduce the risk of punishment. It would make no difference in which State the illegal transporter might be apprehended, because he could easily provide himself with documents showing an intention to deliver the shipmnet in another State, and thus invoke the protection of the Commerce Clause. In *Ziffrin* v. *Reeves, supra*, this Court held that whiskey removed from permitted channels and declared contraband by the Kentucky statute "cannot be regarded as a proper article of commerce". Upon the same principle, whiskey intended to be employed to violate the Twenty-first Amendment cannot be so regarded. The commerce power was conferred on Congress to promote legitimate commerce between the States, not to protect or facilitate the commission of a crime against a State where the criminal act itself is prohibited by the Constitution. It is difficult to perceive, in the light of the principles enunciated in recent deicsions of this Court, how a State regulation which prevents a shipment admittedly intended to violate the Constitution, can be said to be an improper burden on or obstruction of interstate commerce. Such a shipment of intoxicating liquors is not within the protection of the Commerce Clause and

the appellants are without standing to invoke it or to challenge the regulation. See the following cases cited in the footnote of Mr. Justice Jackson's opinion in the *Duckworth case, supra:*

New York ex rel Hatch v. *Reardon*, 204 U. S. 152, 160;

Henneford v. *Silas Mason Co.*, 300 U. S. 577, 583;

Premier Pabst Sales Co. v. *Grosscup*, 298 U. S. 226, 227.

CONCLUSION

The judgment of the court below is clearly right and should be affirmed.

Respectfully submitted,

ABRAM P. STAPLES
Attorney General of Virginia.

APPENDIX

Section 49-a of Alcoholic Beverage Control Act of 1936, Michie's Va. Code of 1942, Sec. 4675 (49a).

"Section 4675 (49a). *Transportation; transportation permits; penalties.*—The transportation of alcoholic beverages, other than wine and beer, purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia, in quantities in excess of one gallon is prohibited except in accordance with regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act within, into or through Virginia in quantities in excess of one gallon, as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations.

"Any person who shall transport alcoholic

beverages other than wine and beer purchased from persons licensed to sell the same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, in excess of one gallon, in violation of such regulations shall be guilty of a misdemeanor and punished as provided in section 4675 (62). (1936, p. 434.)"

Regulations of Alcoholic Beverage Control Board, Section 42 (Order No. A-1, Aug. 30, 1940).

"Section 42. The Transportation of Alcoholic Beverages as Defined in the Virginia Alcoholic Beverage Control Act, as Amended, Within, Into, or Through the State of Virginia in Quantities in Excess of One Gallon.

"Before any person shall transport any alcoholic beverages within, into or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and or deliver any alcoholic beverages within, into, or through the State of Virginia; and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation.

"Provided, however, that no such bond shall

be required of any person licensed under the Virginia Alcoholic Beverage Control Act, as amended, to sell alcoholic beverages when such alcoholic beverages are being transported in a vehicle belonging to the licensee.

"Provided further that no such bond shall be required of any person transporting wine and or beer purchased from persons licensed under the provisions of the Virginia Alcoholic Beverage Control Act, as amended, or those alcoholic beverages which may be manufactured and sold without any license under the Virginia Alcoholic Beverage Control Act, as amended."

Regulations of Alcoholic Beverage Control Board, Section 44 (Order No. A-1, Aug. 30, 1940).

"Section 44. Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Sections 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment, signed by the consignor showing an exact description of the alcoholic beverages being transported, the name and address of the consignor; the name and address of the consignee; the route

to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported, and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or other memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

J. Frankfurter 2, 3, 4,

SUPREME COURT OF THE UNITED STATES.

Nos. 134 and 198.—October Term, 1943.

John Thomas Carter and Eugene Pearson Macemore, Appellants, 134 *vs.* The Commonwealth of Virginia. Earl Dickerson, W. O. Page, et al., Appellants, 198 *vs.* Commonwealth of Virginia.	Appeals from the Supreme Court of Appeals of the State of Virginia.

[January 31, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

The appellants were convicted of violations of the Virginia Alcoholic Beverage Control Act[1] and certain Regulations issued pursuant to it, concerning the transportation of intoxicating liquor through the Commonwealth. Their contention that the pertinent provisions of the Act and Regulations[2] violated the Commerce Clause, Article I, Section 8(3), of the Federal Constitution was rejected by Virginia's highest court, the Supreme Court of Appeals. 181 Va. 306, 313. The cases are here on appeals pursuant to Section 237(a) of the Judicial Code, 28 U. S. C. § 344(a).

The Act in question contains a comprehensive scheme for the control of trade in alcoholic beverages within the territory of Virginia. By the statute an Alcoholic Beverage Control Board is established and authorized to adopt such regulations "as it may deem necessary" to confine the transportation of liquor "to legitimate purposes."[3] The A. B. C. Board promulgated regulations

[1] Michie's Virginia Code (1942) Sec. 4675.

[2] Regulations of the Virginia Alcoholic Beverage Control Board, Sections 42, 44.

[3] Virginia Code Section 4675(49a). "Transportation; transportation permits; penalties.—The transportation of alcoholic beverages, other than wine and beer purchased from persons licensed to sell same in this State, and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through the State of Virginia in quantities in excess of one gallon is prohibited except in accordance with

applicable to transportation through Virginia.[4] The requirements here in issue are these: (1) The vehicle must use the most direct route and carry a bill of lading showing the route it will travel; (2) The carrier must post a bond in the penal sum of $1000 conditioned on lawful transportation; and (3) The bill of lading must show the name of the true consignee, and that consignee must have a legal right to receive the beverages at the stated destination.

Both cases reached the Virginia Supreme Court on stipulated facts. In No. 134, it was agreed that Carter and Mackmore received 168 gallons of whiskey from a wholesaler in Maryland for transportation to an individual consignee in Thomasville, North

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regulations adopted by the Virginia Alcoholic Beverage Control Board pursuant to this section.

"The board may adopt such regulations governing the transportation of alcholic beverages, other than wine and beer purchased from persons licensed to sell same in this State and those alcoholic beverages which may be manufactured and sold without any license under the provisions of this act, within, into or through Virginia in quantities in excess of one gallon as it may deem necessary to confine such transportation to legitimate purposes and may issue transportation permits in accordance with such regulations. . . ."

[4] Section 42 of the Regulations provides: "Before any person shall transport any alcoholic beverages within, into, or through the State of Virginia, such person shall post with the Virginia Alcoholic Beverage Control Board a bond with approved surety, payable to the Commonwealth of Virginia, in the penalty of One Thousand Dollars, upon condition that such person will not unlawfully transport and/or deliver any alcoholic beverages within, into, or through the State of Virginia, and evidence that the required bond has been posted shall accompany the alcoholic beverages at all times during transportation. . . ."

Section 44 reads as follows: "Where alcoholic beverages are desired to be transported within, into, or through the State of Virginia (except those instances mentioned in Section 42 and 43 of these Regulations), such transportation shall be engaged in only when in accordance with the provisions of these regulations:

"(a) There shall accompany such alcoholic beverages at all times during transportation, a bill of lading or other memorandum of shipment signed by the consignor showing an exact description of the alcoholic beverages being transported; the name and address of the consignor; the name and address of the consignee; the route to be traveled by such vehicle while in Virginia and such route must be the most direct route from the consignor's place of business to the place of business of the consignee.

"(b) Vehicles transporting alcoholic beverages shall not vary from the route specified in the bill of lading or other memorandum of shipment.

"(c) The name of the consignor on any such bill of lading or other memorandum of shipment shall be the name of the true consignor of the alcoholic beverages being transported and such consignor shall only be a person who has a legal right to make such shipment. The name of the consignee on any such bill of lading or memorandum of shipment shall be the name of the true consignee of the alcoholic beverages being transported and who has previously authorized in writing the shipment of the alcoholic beverages being transported and who has a legal right to receive such alcoholic beverages at the point of destination shown on the bill of lading or other memorandum of shipment."

Carolina. The appellants were apprehended in Rappahanock County, Virginia, while carrying the whiskey by truck. The appellants themselves did not post a bond, and a bond which was posted by the registered owner of the truck was cancelled because he was reputed to be a bootlegger. Their bill of lading did not show the route to be traversed through Virginia, and the intended delivery to the consignee was forbidden by the laws of North Carolina.

The facts stipulated in No. 198 are similar. Dickerson was arrested in Prince William County, Virginia, while driving a truck carrying more than one gallon of alcoholic beverages. He was traveling by the most direct route from Maryland to his employer-consignee, Page, in North Carolina. Page had posted the required bond, but the bill of lading did not show the route to be traveled, and Page was forbidden by the laws of North Carolina to accept delivery there.

All the individuals involved in the two cases were residents of North Carolina.

The appellants argue, first, that the Twenty-first Amendment gives Virginia no power to prohibit absolutely the shipment of liquor from Maryland to North Carolina through Virginia; second, that its power to regulate such shipments is limited by the Commerce Clause to regulations reasonably necessary to enforce its local liquor laws and not unduly burdensome on interstate commerce; third, that Virginia has no authority to penalize prospective violations of the criminal laws of North Carolina or the United States. It will be observed that the intoxicating liquors in question are intended for continuous shipment through Virginia, so that here, as in the *Duckworth* case,[5] a different question arises from those considered under the Twenty-first Amendment,[6] where transportation or importation into a state for delivery or use therein was prohibited. But we may put aside the first and third contentions, for we are satisfied that Virginia may, notwithstanding the Commerce Clause and independently of the Twenty-first Amendment, in order to protect herself from illicit liquor traffic within her borders, subject the shipment of liquor through Virginia to the regulations here in question.

[5] Duckworth *v.* Arkansas, 314 U. S. 390, 392-3.

[6] See State Board *v.* Young's Market Co., 299 U. S. 59; Mahoney *v.* Joseph Triner Corp., 304 U. S. 401; Brewing Co. *v.* Liquor Comm'n, 305 U. S. 391; Joseph S. Finch & Co. *v.* McKittrick, 305 U. S. 395.

We have recognized that the several states in the absence of Federal legislation may require regulatory licenses for through shipments of liquor in order to guard against violations of their own laws. *Duckworth* v. *Arkansas*, 314 U. S. 390. Thus this Court has extended to this very field its recognition that regulation of interstate commerce by local authority in the absence of Congressional action is admissible to protect the state from injuries arising from that commerce. *California* v. *Thompson*, 313 U. S. 109, 113, 115, and cases cited; *Clark* v. *Paul Gray, Inc.*, 306 U. S. 583, 591; *Morf* v. *Bingaman*, 298 U. S. 407, 410; *Clyde Mallory Lines* v. *Alabama*, 296 U. S. 261, 267. The commerce power of Congress is not invaded by such police regulations as Virginia has here enforced.

The state of transit may compel the carrier to furnish information necessary for checking the shipment against unlawful diversion, and the requirement that the truck follow a direct, stated route is within the rule of *Duckworth* v. *Arkansas*, *supra*. Similarly, a state may require a reasonable bond of one who wishes to engage in interstate trade of a kind dangerous to well-recognized local interests. *California* v. *Thompson*, 313 U. S. 109.

The state court did not pass upon the legality under state or Federal law of the cancellation of the bond in No. 134, since it concluded that only the bondsman, who was not a party to the proceeding, had standing to object under applicable state procedure. As no procedural due process point is raised, we accept its conclusion without further examination. *United Gas Co.* v. *Texas*, 303 U. S. 123, 139. It is urged, however, that the Board's power to cancel a bond because of doubts as to the trustworthiness of the bondsman amounts to an undue burden on interstate commerce.

The bond is to be furnished, according to Section 42 of the Regulations, by the person transporting the liquor. Thus the requirement that the bond be signed by a responsible person appears to raise the same type of question as the requirement that delivery be lawful at the place of consignment, and the two may be considered together. Of the latter rule, the Virginia court said,

"We cannot escape the conclusion that one who deliberately and intentionally violates the Federal Constitution and the law of his resident State, in the unlawful transportation of liquor would hardly hesitate to violate the laws of this state while passing

through if he thought he might profit thereby. We cannot shut our eyes to the possibilities of such a situation and the necessity of prevention."

We are therefore dealing with a case in which Virginia is attempting no more than the enforcement of her own laws; she is not seeking to inflict punishment for the violation of the laws of North Carolina. Whether or not she is entitled thus to enforce her laws must be judged in the light of our long-standing recognition of the exceptional problems involved in successfully regulating trade in intoxicating liquors. *James Clark Distilling Co.* v. *Western Maryland R. Co.*, 242 U. S. 311, 332; *Duckworth* v. *Arkansas*, *supra*, at 396. We do not consider the appellee's suggestion that complete exclusion (and hence these partial restraints) of motor carriers from the through liquor traffic and a limitation of through transit to rail carriers would be consonant with the Commerce Clause. Cf. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132, 140. Whatever may be the effect of the Twenty-first Amendment, this record presents no problem that may not be resolved under the Commerce Clause alone. That Clause remains in the Constitution as a grant of power to Congress to control commerce and as a diminution *pro tanto* of absolute state sovereignty over the same subject matter. The Twenty-first Amendment limits that grant of power as to intoxicating liquor by prohibiting "transportation or importation into any State, Territory, or possession of the United States for delivery or use therein . . . in violation of the laws thereof." By interpretation of this Court the Amendment has been held to relieve the states of the limitations of the Commerce Clause on their powers over such transportation or importation.[7] It has also been held that shipment through a state is not transportation or importation into the state within the meaning of the Amendment. *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, 535, 538. But in the present case we need not consider the power of Virginia under the Twenty-first Amendment to regulate through shipments. It is enough that Virginia could conclude, in the absence of contrary Federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws[8] and the laws of a neighboring state.

[7] State Board v. Young's Market Co., 299 U. S. 59; Brewing Co. v. Liquor Comm'n, 305 U. S. 391.

[8] Twenty-first Amendment, Section 2; 27 U. S. C. § 122.

By her ruling she has imposed no substantial clog on whatever cognate rights her sister states may have to determine their own policies regarding intoxicating liquors and to receive alcoholic beverages in interstate commerce, if they so desire.

For these reasons the judgment is

Affirmed.

Mr. Justice JACKSON concurs in the result only, for the reasons stated in his separate opinion in *Duckworth* v. *Arkansas*, 314 U. S. 390.

SUPREME COURT OF THE UNITED STATES.

Nos. 134 and 198.—October Term, 1943.

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[January 31, 1944.]

Mr. Justice Black, concurring.

I am not sure that state statutes regulating intoxicating liquor should ever be invalidated by this Court under the Commerce Clause except where they conflict with valid federal statutes. Cf. dissenting opinions, *McCarroll* v. *Dixie Greyhound Lines, Inc.*, 309 U. S. 176, 183; *Gwin, etc., Inc.* v. *Henneford*, 305 U. S. 434, 442; *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 316. The Twenty-first Amendment has placed liquor in a category different from that of other articles of commerce. Though the precise amount of power it has left in Congress to regulate liquor under the Commerce Clause has not been marked out by decisions, this much is settled: local, not national, regulation of the liquor traffic is now the general Constitutional policy. *Ziffrin, Inc.* v. *Reeves*, 308 U. S. 132; *Indianapolis Brewing Co.* v. *Liquor Control Commission*, 305 U. S. 391; *State Board of Equalization of California* v. *Young's Market Co.*, 299 U. S. 59.

Whatever limited force the Commerce Clause may retain with regard to the liquor traffic, it should not require the invalidation of the Virginia statutes here involved, which do not conflict with any Act of Congress, and which are designed to enforce local liquor policies. Virginia seems to think that, unless adequate precautionary regulations are devised and enforced, liquor shipments ostensibly being transported through her territory to a neighboring

state could be diverted for bootleg purposes contrary to her laws. Such precautionary regulations must come from either Virginia or the federal government. The legislature of Virginia has provided them; the Congress has not. This Court could invalidate the Virginia regulations, but only the Congress could devise and substitute effective federal regulations to take their place. I therefore agree with the Court "that Virginia could conclude, in the absence of contrary Federal legislation, that she could not safely permit the transportation of liquor through her territory by those who concededly mean to break Federal laws and the laws of a neighboring state."

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[January 31, 1944.]

Mr. Justice Frankfurter, concurring.

1. After as thorough a consideration as it ever gave to a problem, this Court, in a long series of cases beginning with *Bowman* v. *Chicago etc. Railway Co.*, 125 U. S. 465, decided that intoxicating liquor is a legitimate subject of commerce, as much so as cabbages and candlesticks, and as such within the protection of the Commerce Clause. In the absence of regulation by Congress, the movement of intoxicants in interstate commerce like that of all other merchantable goods was "free from all state control." *Clark Distilling Co.* v. *West'n Md. Ry. Co.*, 242 U. S. 311, 323, 327, citing *Leisy* v. *Hardin*, 135 U. S. 100; *In re Rahrer*, 140 U. S. 545; *Vance* v. *W. A. Vandercook Company (No. 1)*, 170 U. S. 438; *Rhodes* v. *Iowa*, 170 U. S. 412. All of these decisions are still on the books. And so, before the Twenty-first Amendment displaced the Eighteenth, Mr. Justice Holmes was able to say: "I cannot for a moment believe that apart from the Eighteenth Amendment special constitutional principles exist against strong drink. The fathers of the Constitution so far as I know approved it." *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 169.

2. If then the Commerce Clause be the measure of State action, such a requirement as the posting of a bond for transportation of goods from without Virginia would be beyond Virginia's powers even if the shipment of the liquor were for delivery into Virginia. *Heyman* v. *Southern Railway Co.*, 203 U. S. 270; *Adams Express*

Heyman v. Hays, 236 U.S. 178

Co. v. *Kentucky*, 206 U. S. 129. Cases like *California* v. *Thompson*, 313 U. S. 109, which recognize the power of States to regulate local activities by taxation or otherwise related even though they be to interstate commerce, but none of which was concerned with restricting the through-passage of goods, liquor or any other, afford no basis for suggesting that a State has power to license the movement of goods in interstate commerce on oppressive or prohibitive terms. *A fortiori*, the Commerce Clause would prohibit and not permit such legislation as is before us in the case of liquor arriving in Virginia for ultimate delivery without.

3. In the light of the uniform current of decisions under the Commerce Clause prior to the Twenty-first Amendment, the Virginia legislation could not survive as to shipments bound beyond its borders. If the legislation is valid, as I believe it to be, it must be solely because the range of State control over liquor has been extended by the Twenty-first Amendment beyond the permissive bounds of the Commerce Clause.

4. The legislation is sustainable under the Twenty-first Amendment on one of two considerations. It is a notorious fact that State prohibition laws were to no small measure evaded by illicit diversion of liquor claimed to be transported through a State. Since we are dealing with a constitutional amendment that should be broadly and colloquially interpreted, liquor that enters a State in the manner in which the liquor here came into Virginia may, without undue liberty with the English language, be deemed to be for "delivery" there even though it is consigned for another State. The Twenty-first Amendment prohibits the "transportation or importation into any State . . . of intoxicating liquors, in violation of the laws thereof", not when the liquor is for delivery *and* use but for "delivery *or* use therein". In other words, liquor need not be intended for consumption in a State to be deemed to be imported into the State and therefore subject to control by that State. The decision in *Collins* v. *Yosemite Park Co.*, 304 U. S. 518, has nothing whatever to do with the relation of the Commerce Clause to the power given the States by the Twenty-first Amendment to control the liquor traffic. That was a suit "to restrain enforcement of the [California] Alcoholic Beverage Control Act within Yosemite Park, on the theory that the Park is within the exclusive jurisdiction of the United States". All that was there decided, after extended consideration of the relation of the United States to the Yosemite Park, was that the United States did exercise

exclusive jurisdiction over the land ceded by California to the Federal Government for park purposes, and that of course when "exclusive jurisdiction is in the United States, without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable." 304 U. S. at 538. State control must yield to superior federal power, but State control by one State, since the Twenty-first Amendment, need not yield to State control by another State.

5. In the alternative, since Virginia has power to prohibit the importation of liquor within that Commonwealth, it may effectuate that purpose by measures deemed by it necessary to prevent evasion of its policy by pretended through-shipments. In a word, having the power to prohibit liquor from coming into a State, a State may take measures against frustration of that power by resort to the claim that liquor passing through a State enjoys the protection of the Commerce Clause. If a State may take these protective measures, as surely it may, who is to decide what measures are necessary for its protection? If a State may ask for the posting of a $1,000 bond, may she not require a $10,000 bond? If a State should urge that its experience shows that any regulatory system is ineffective because illicit diversion is too resourceful for control by mere regulation and requires prohibition, who is to say, in view of the history embedded in the Twenty-first Amendment, that a State may not fairly act on such a judgment? Are not these peculiarly political, that is legislative, questions which were not meant by the Twenty-first Amendment to continue to be the fruitful apple of judicial discord, as they were before the Twenty-first Amendment?

6. It is now suggested that a State must keep within "the limits of reasonable necessity" and that this Court must judge whether or not Virginia has adopted "regulations reasonably necessary to enforce its local liquor laws". Such canons of adjudication open wide the door of conflict and confusion which have in the past characterized the liquor controversies in this Court and in no small measure formed part of the unedifying history which led first to the Eighteenth and then to the Twenty-first Amendment.

7. Less than six years ago this Court rejected the impossible task of deciding, instead of leaving it for legislatures to decide, what constitutes a "reasonable regulation" of the liquor traffic. The issue was fairly presented in *Mahoney* v. *Triner Corp.*, 304 U. S. 401. And this was the holding:

> "We are asked to limit the power conferred by the Amendment so that only those importations may be forbidden which, in the opinion of the Court, violate a reasonable regulation of the liquor traffic. To do so would, as stated in the *Young's Market case,* [299 U. S. 59] p. 62, 'involve not a construction of the Amendment, but a rewriting of it.'" 304 U. S. at 404.

Therefore if a State, in aid of its powers of prohibition, may regulate, without let or hindrance by courts regarding the "reasonableness" of a regulation, it may do so whether the liquor is openly consigned for consumption within it or intended for consumption there although, by subterfuge too difficult to check, nominally destined elsewhere.

8. Fuller consideration has therefore convinced me that the power exercised by the State in *Duckworth* v. *Arkansas,* 314 U. S. 390, as well as in this case must rest on the authority given to the States by the Twenty-first Amendment. And since Virginia derives the power to legislate as she did from the Twenty-first Amendment, the Commerce Clause does not come into play. So this Court has twice ruled. "Since the Twenty-first Amendment, as held in the *Young* case, the right of a state to prohibit or regulate the importation of intoxicating liquor is not limited by the commerce clause." *Brewing Co.* v. *Liquor Comm'n,* 305 U. S. 391, 394; see also *Finch & Co.* v. *McKittrick,* 305 U. S. 395, 398.

[299 U.S. 59]